

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

PAWNEE PETROLEUM)	
PRODUCTS, LLC.,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 01-1314-WEB
)	
STEPHEN C. CRAWFORD, <i>et al.</i> ,)	
)	
Defendants.)	
<hr style="width: 40%; margin-left: 0;"/>)	

MEMORANDUM AND ORDER

The court now considers a motion to amend pleadings by defendant James P. Beresford (Beresford). Beresford submitted a consolidated motion seeking leave to amend his answer to the complaint filed by Pawnee Petroleum Products, L.L.C. (Pawnee Petroleum), and to amend his answer to the cross-claim filed by Pawnee County Cooperative Association (Pawnee Coop). (Doc. 170.) Pawnee Petroleum and Pawnee Coop filed a consolidated response. (Doc. 189). No reply has yet been filed.¹ Beresford's motion to amend his answer to Pawnee Coop's cross-claim is

¹While the time for filing the reply has not yet expired, the court believes the issues raised in the motion and response have been adequately briefed and the court need not wait for a reply prior to issuing its ruling.

GRANTED. Beresford's motion to amend his answer to Pawnee Petroleum's complaint is GRANTED, subject to limitations described herein.

Factual Background

Defendants Beresford, Gary Pittman (Pittman), and Stephen Crawford (Crawford), were investors in companies that owned three truck-stops (the Truck-stop Companies) in Guymon, Oklahoma; Goodland, Kansas; and Grain Valley, Missouri. (Doc. 169 at 3.) From sometime in the 1990's until 2001, Pawnee Petroleum supplied fuel to the Truck-stop Companies for retail sale. *Id.* By early 2000, the Truck-stop Companies owed Pawnee Petroleum approximately \$1.9 million for fuel the latter had provided.² *See* Goodland Mgm't, Fuel and Purchase Money Security Agreement (Goodland Agreement) at 1; Guymon Mgm't, Fuel and Purchase Money Security Agreement (Guymon Agreement) at 1; Grain Valley Mgm't, Fuel and Purchase Money Security Agreement (Grain Valley Agreement)

²The basis for this figure is somewhat confusing. In its complaint (Doc. 1), Pawnee Petroleum declared this debt to be slightly less than \$1 million. However, the complaint listed the debt for the Guymon, Oklahoma truck-stop as zero. *Id.* On the other hand, the Guymon Agreement lists the Guymon debt at almost \$1 million. *See* Guymon Agreement. This inconsistency accounts for the difference between the sum total of approximately \$1.9 million from the Goodland, Guymon, and Grain Valley Agreements, and the approximately \$1 million figure listed in the complaint. For the purposes of this order, the difference is irrelevant.

at 1.³

In an apparent effort to secure Pawnee Petroleum's continued promise to supply fuel, the Truck-stop Companies entered into agreements with Pawnee Coop and Pawnee Petroleum whereby Pawnee Coop would take over management of the truck-stops, and Pawnee Petroleum would continue to supply fuel, taking a purchase money security interest in any fuel delivered and the proceeds thereof. *See* Goodland Agreement; Guymon Agreement; Grain Valley Agreement. Beresford, Pittman and Crawford also signed the agreements for the purpose of rendering personal guarantees for payment of management fees owed to Pawnee Coop under the arrangement. *See, e.g.*, Goodland Agreement § 6. Additionally, section 6 of the Grain Valley Agreement purports to have Beresford, Pittman, and Crawford affirm or ratify personal guarantees on prior debts owed to Pawnee Petroleum. Grain Valley Agreement § 6. These pre-existing personal guarantees were allegedly executed in 1996.

Beginning in the fall of 2000, creditors of the Truck-stop Companies began foreclosure proceedings. (Doc. 169 at 3.) By 2002, the last of the three facilities had been sold at a sheriff's sale. *Id.* at 4. Pawnee Petroleum filed the instant

³These management agreements can be found in the record as attachments to Doc. 14. They are referenced by name for sake of clarity.

action seeking payment for the Truck-stop Companies' debts based on the defendants' personal guarantees. (Doc. 1.)

In his motion to amend, Beresford seeks to file counterclaims against Pawnee Petroleum for breach of contract, breach of fiduciary duty, and breach of the duty of good faith and fair dealing. He also denies having signed the original personal guarantee in 1996, claiming instead that his purported signature on that document is a forgery. Furthermore, he suggests that Pawnee Petroleum used the forged document to fraudulently obtain Beresford's approval of the Grain Valley Agreement in 2000, along with the accompanying reaffirmation of his personal guarantee. Accordingly, Beresford seeks to assert as affirmative defenses that Pawnee Petroleum used fraud to obtain his personal guarantee in 2000, and that Pawnee Petroleum used fraud to obtain his approval of the Grain Valley Agreement. Finally, Beresford seeks to assert the affirmative defense that Pawnee Petroleum improperly inflated prices on the fuel that it supplied to the Truck-stop Companies.⁴

In addition, Beresford seeks leave to assert a counterclaim against Pawnee Coop, alleging that the latter fraudulently induced him to enter into the Grain

⁴ While the motion to amend does not contain discussion of the specific basis for the inflated fuel charge claim, other related pleadings by defendants outline the nature and basis of this claim. *See e.g.*, Doc. 137, ¶¶ 87-97.

Valley Agreement based on the forged personal guarantee. Finally, he seeks to assert fraud as an affirmative defense to his personal guarantee and to the Grain Valley Agreement.

Standard to Amend

Fed. R. Civ. P. 15(a) provides that leave to amend shall be freely given when justice so requires. In the absence of any apparent or declared reason, such as undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment, leave to amend should, as the rules require, be freely given.

Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962);

Frank v. U.S. West, Inc., 3 F.3d 1357, 1365 (10th Cir. 1993).

A district court is justified in denying a motion to amend as futile, however, if the proposed amendment could not withstand a motion to dismiss or otherwise fails to state a claim. *Ketchum v. Cruz*, 961 F.2d 916, 920 (10th Cir. 1992). A court may not grant dismissal “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”

Sutton v. Utah State Sch. for Deaf & Blind, 173 F.3d 1226, 1236 (10th Cir. 1999) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)).

Discussion

Contract Claims

Beresford's claims for breach of contract, breach of fiduciary duty, breach of duty of good faith and fair dealing, and inflation of fuel prices all arise out of the various management agreements between Pawnee Coop, Pawnee Petroleum, and the Truck-stop Companies. (Doc. 169 ¶¶ 26-44.) By the express terms of those agreements, Beresford was a party to the agreements for the *sole purpose* of providing personal guarantees. *See, e.g.* Grain Valley Agreement at 1. The terms of the contract clearly indicate that Pawnee Coop and Pawnee Petroleum owed obligations to the Truck-stop Companies, not to Beresford personally. *See, e.g., generally* Grain Valley Agreement. Accordingly, Beresford was not an intended third-party beneficiary of those agreements. Instead, Beresford's benefits flowed only from his position as a shareholder of the Truck-stop Companies.

Kansas law makes clear that a shareholder lacks standing to redress injury to a corporation, unless the shareholder was personally injured in some manner other than mere diminution in the value of his stock. *Comeau v. Rupp*, 810 F.Supp. 1127, 1153 (D. Kan. 1992) (citing *K-B Trucking Co. v. Riss Int'l Corp.*, 763 F.2d 1148, 1154 n. 7 (10th Cir.1985)); *Speer v. Dighton Grain, Inc.*, 229 Kan. 272, 284 & syl. ¶ 9, 624 P.2d 952 (1981)); *see also Blocker v. Meehan*, 1989 WL

85165, *2 (D. Kan. 1989). This rule has also been applied to prevent members of limited liability companies from asserting suits on behalf of the LLC. *See Safety Technologies, L.C. v. Biotronix 2000, Inc.*, 136 F.Supp.2d 1169, 1173 n.3 (D. Kan. 2001) (“The court believes that the Kansas Supreme Court would also apply this precedent limiting lawsuits by individual shareholders to limit lawsuits by members of limited liability companies.”). Thus, under this general rule, Beresford lacks standing to assert these contract claims, which rightfully belong to the corporation and the limited liability companies that own the truck-stops. Therefore, his motion to add these claims would ordinarily be futile.

Exceptions to this general rule arise in the case of guarantees. While a guarantor may not normally assert claims that belong to his principal, he may use those claims as a set-off against the creditor when the principal is insolvent. *First Texas Serv. Corp. v. Roulier*, 750 F. Supp. 1056, 1061 (D. Colo. 1990) (quoting *Cont’l Group, Inc. v. Justice*, 536 F. Supp. 658, 661 (D. Del. 1982)); *see also Nat’l Sur. Co. v. George E. Breece Lumber Co.*, 60 F.2d 847, 851 (10th Cir. 1932) (interpreting New Mexico surety law); Restatement Third, Suretyship and Guaranty § 34(1); Restatement of Security § 133(2) (1941). However, the guarantor may not affirmatively recover on the principal’s claims. *First Texas*, 750 F. Supp. at 1061. Therefore, “if the guarantor's recovery on his counterclaims

exceeds his liability under the guaranty, the guarantor may not recover this excess.” *Id.* (citations omitted).⁵

The facts indicate that the principals (the various Truck-stop Companies) are insolvent. (Doc. 1 ¶ 10.) Therefore, Beresford is entitled to assert the contract claims and defenses based on the underlying management agreements because he is the guarantor of an insolvent principal. However, he may only use the contract claims as a set-off against his obligations under the guarantee. Hence, he will not be permitted to affirmatively recover under any of the contract claims. Accordingly, Beresford’s motion to add claims and defenses arising under contracts is GRANTED, subject to their use only as a set-off against his obligations under the guarantee.⁶

⁵The court was unable to find a Kansas case directly addressing the issue of a guarantor using his principal’s claims as a set-off; however, that rule appears to be widely accepted, as demonstrated by the cited authorities. Indeed, if a guarantor were barred from asserting claims and defenses based on the underlying transaction, unscrupulous creditors would be able to collect on nonmeritorious claims by suing the guarantor rather than the defaulting principal. Therefore equity demands that the guarantor be able to use claims and defenses of an insolvent principal in order to arrive at the true debt to which the guarantor should be held. The court believes that the Kansas Supreme Court would adopt such a rule. The rule is therefore deemed applicable in this case.

⁶The court will not require that the proposed amended claims be revised or redrafted to specifically allege that they are limited to use as a set-off. This order will adequately limit the scope of those claims.

Fraud Claims

Unlike the contract claims, Beresford's fraud claims arise out of negotiations between himself and the Pawnee entities. He alleges that Pawnee Coop and Pawnee Petroleum engaged in deception to convince Beresford to enter into the Grain Valley Agreement, along with its purported ratification of his 1996 personal guarantee. (Doc. 169 at 1-2.) Since these claims arise directly from Beresford's dealings with Pawnee Petroleum and Pawnee Coop, they are personal to him and not derived from his role as a shareholder of the Truck-stop Companies. Therefore, Beresford has standing to bring these claims.

Beresford alleges that he never signed the personal guarantee in 1996. (Doc. 169 at 5.) Furthermore, he states that, in executing the Grain Valley Agreement, he materially relied on assertions by the Pawnee entities that they possessed his original 1996 personal guarantee. *Id.* ex. B ¶ 57. While Pawnee Coop and Pawnee Petroleum characterize Beresford's argument as "fallacious" and "illegitimate" (Doc. 189 ex. A, at 9), the court finds it conceivable that Beresford may have had legitimate doubts about whether he executed the personal guarantee in 1996. After all, even if Beresford honestly believed that he did not sign the guarantee, the fact that the Pawnee entities were providing copies of what appeared to be his signature on the purported guarantee could have caused

Beresford to question his memory some four years later. Moreover, business dealings can entail signing numerous documents. Therefore, failure to have a clear memory about whether one particular document was signed is understandable.

In further support of his fraud claims, Beresford has produced substantial evidence to show that Pawnee Coop and Pawnee Petroleum were aware that they did *not* have Beresford's original guarantee from 1996, and that they engaged in deceptive efforts to obtain Beresford's approval of the Grain Valley Agreement in order to remedy that problem. *See, e.g.*, Doc. 169 ex. J, Transcript of the Testimony of Mike Graham, at 33:19-37:25 (former president of Pawnee Petroleum admits that Pawnee Petroleum did not have the original Beresford personal guarantee as of late 1999); *id.* at 70:24-72:24 (Graham acknowledges that at least one reason the Pawnee entities might have required a reaffirmation of the personal guarantees in the Grain Valley Agreement was because the Pawnee entities could not find the original documents); *id.* at 78:4-81:13 (Graham admits that he knew the Pawnee entities had never received a Beresford original personal guarantee); *id.* (Graham admits to intentionally altering a faxed copy of the purported Beresford personal guarantee so that it would appear to be an original document when faxed to Beresford's representatives).

Furthermore, other evidence has emerged that suggests irregularities with Beresford's 1996 guarantee. *See, e.g., id. ex. Q*, Transcript of the Testimony of Lori Ward, at 82:20-83:4 (a former Pawnee Petroleum manager states that the copy of the Beresford personal guarantee attached to Pawnee Petroleum's original complaint was not a Pawnee Petroleum document because all of Pawnee Petroleum's personal guarantee forms contained the word "guarantor" under the signature line); *id. ex. R*, Transcript of the Testimony of Terry Sean Green, at 35:1-37:23 (the individual whose notary signature appears on the purported Beresford personal guarantee suggests that his notary seal and signature may have been photocopied from another document and superimposed on the Beresford document by "cut and paste"). Finally, three different documents related to the Beresford personal guarantee have emerged that, taken collectively, suggest some fraudulent activity may have occurred. *See Doc. 169 ex. C* (copy of the Beresford guarantee *without* "guarantor" under the signature line); *id. ex. M* (copy of the Beresford guarantee *with* "guarantor" under the signature line); *ex. P* (un-executed copy of a personal guarantee form bearing Beresford's name at the top and with the words "guarantor" under the signature line having been obscured by correction tape, purportedly discovered by Pawnee Petroleum in its files in February, 2003). Overall, Beresford has made an adequate showing that he should be allowed to

amend his answers to assert claims and defenses based on fraud.

Pawnee Coop and Pawnee Petroleum assert that, despite Beresford's evidence, his amendments should be rejected as futile because 1) his fraud claims are barred by the statute of limitations; and 2) Beresford's signature on the Grain Valley Agreement operates to ratify the prior fraud, which is clearly permitted under Kansas law. (Doc. 189 at 2.) The court will address these contentions in turn.

Kansas law provides a two-year statute of limitations for fraud. K.S.A. § 60-513(a)(3). However, that statute operates to bar "actions," not affirmative defenses. *See id.* "[T]he statute of limitations . . . do[es] not bar the affirmative defense of fraud." ***Henry v. Office of Thrift Supervision***, 43 F.3d 507, 514 (10th Cir. 1994) (applying Kansas law.); *see also Hatfield v. Burlington N. R. Co.*, 747 F. Supp. 634, 640 (D. Kan. 1990) (counterclaim barred by statute of limitations may still be used as an affirmative defense); ***Belger Cartage Serv., Inc. v. Holland Const. Co.***, 224 Kan. 320, 331, 582 P.2d 1111, 1121 (1978) (counterclaim barred by statute of limitations may still be used as an affirmative defense). Thus, Beresford's *defenses* of fraud are not barred by the statute of limitations. Moreover, even if his counterclaim for fraudulent inducement is time-barred, it will still be permitted as an affirmative defense, to the extent it provides any

additional benefit beyond the other fraud defenses Beresford asserts against Pawnee Coop. See **Hatfield**, 747 F. Supp. at 640; **Belger**, 224 Kan. at 331, 582 P.2d at 1121. Hence, the only remaining statute of limitations issue is whether K.S.A. § 60-513 bars Beresford's counterclaim for fraudulent inducement against Pawnee Coop.

The statute of limitations for fraud begins to run when "the fraud is discovered." K.S.A. § 60-513(a)(3). Fraud is discovered not only when the victim acquires actual knowledge, but also when he reasonably should have discovered the fraud. See **Wolf v. Brungardt**, 215 Kan. 272, 281, 524 P.2d 726, 733-34 (1974). The Pawnee entities assert that, assuming there was fraud, Beresford was placed on notice of that fraud between January and April, 2000, when he received a copy of his purported personal guarantee from 1996. (Doc. 189 at 8.) Thus, they argue, the two-year statute of limitations would have expired not later than April, 2002, and Beresford's fraud claims are therefore barred.

Although Pawnee Coop concludes that Beresford should have reasonably discovered any fraud when he was given the copy of his purported personal guarantee, determination of when fraud should reasonably have been discovered is an issue of fact. **Paulsen v. Gutierrez**, 962 F. Supp. 1367, 1369 (D. Kan. 1997); **Bryson v. Wichita State Univ.**, 19 Kan. App. 2d 1104, 1109, 880 P.2d 800, 804

(1994). Indeed, Beresford alleges that he did not discover the alleged fraud until after December 16, 2002. (Doc. 169 at 6.) Moreover, there is some evidence to suggest that, even after Pawnee Coop provided the photocopy of the alleged personal guarantee in early 2000, the Coop was actively engaged in efforts to deceive Beresford as to the authenticity of the document. Thus, a factual issue exists as to when Beresford had sufficient knowledge of the suspected fraud to commence the statutory period under K.S.A. § 60-513(a)(3). Since the fraud counterclaim presents a factual question regarding whether the statute of limitations has expired, the amendment therefore is not futile, and will be permitted.

Finally, Pawnee Coop and Pawnee Petroleum suggest Beresford's fraud amendments are futile due to ratification. (Doc. 189 at 2.) The Pawnee entities base their argument on *Cherryvale Grain Co. v. First State Bank of Edna*, 25 Kan. App. 2d 825, 828-32, 971 P.2d 1204, 1207-09 (1999), where the Kansas Court of Appeals discussed ratification of forged instruments. Pawnee Petroleum and Pawnee Coop characterize *Cherryvale* as "compelling authority" (Doc. 189 at 4), and suggest that *Cherryvale* and other case law require the conclusion that Beresford "ratified his guarantee . . . as a matter of law." *Id.* at 5. However, the Pawnee entities ignore their own brief, wherein they state that ratification requires

“full knowledge of all the material circumstances.” *Id.* at 4 (quoting ***Prather v. Colo. Oil & Gas Corp.***, 218 Kan. 111, 117, 542 P.2d 297, 303 (1975)); *see also* ***Vanier v. Ponsoldt***, 251 Kan. 88, 106, 833 P.2d 949, 962 (1992) (discussing ratification in the context of contract fraud); ***Nordstrom v. Miller***, 227 Kan. 59, 68, 605 P.2d 545, 554 (1980) (quoting ***Cleaves v. Thompson***, 122 Kan. 43, 46, 251 P. 429, 430 (1926)). Moreover, ***Cherryvale*** clearly states that whether ratification has occurred is normally a question of fact. ***Cherryvale***, 25 Kan. App. 2d at 830, 971 P.2d at 1208. Since there are factual questions regarding whether ratification occurred and whether, in the face of apparently ongoing deception, Beresford had sufficient knowledge of the relevant facts to be capable of ratifying the personal guarantee, his fraud claims are not futile.

In sum, there are factual disputes surrounding Beresford’s fraud claims and defenses. Thus, those claims would not be subject to dismissal. Since they are not subject to dismissal, they are not futile. Accordingly, Beresford will be permitted to amend his answers to assert claims and defenses based on fraud.

IT IS THEREFORE ORDERED that Beresford’s motion (Doc. 170) to amend his answer to Pawnee Coop’s cross-claim is GRANTED. Beresford’s motion (Doc. 170) to amend his answer to Pawnee Petroleum’s complaint is

GRANTED, subject to the limitation that his contract claims may only be used as a set-off against his obligations under the personal guarantee.

With his motion, Beresford provided original signed copies of his two proposed filings: (1) Consolidated Amended Answer to Complaint and Counterclaim Against Pawnee Petroleum Products, L.L.C.; and (2) Amended Consolidated Answer to Third-Party Cross-Claim of Pawnee County Cooperative Association and Counter Cross-Claim Against Pawnee County Cooperative Association. The Clerk is directed to file both of these documents forthwith.

Pursuant to D. Kan. Rule 5.4.9 and 15.1, the filing by the Clerk will constitute service of these amended pleadings for any attorneys who have consented to electronic service. The Clerk is further directed to forward a hard copy of both amended pleadings to any attorneys who have not consented to electronic service. Any response or reply which may be required in response to these amended pleadings shall be filed within fourteen (14) days of the date of filing of the amended pleadings.

Finally, this motion supercedes Beresford's prior motion for leave to amend

(Doc. 36). (Doc. 169 at 15 n.6.) Accordingly, the Clerk is directed to terminate Beresford's prior motion (Doc. 36) as having been WITHDRAWN.

IT IS SO ORDERED.

Dated at Wichita, Kansas, on this 18th day of April, 2003.

s/ Donald W. Bostwick
DONALD W. BOSTWICK
United States Magistrate Judge